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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JOSEPH R. LENNON,
Petitioner,

versus

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Are proceeds taken by fraud "the same" as proceeds travelling interstate, in violation of 18 U.S.C. section 2314, paragraph 1, when the proceeds taken by fraud are paid *intrastate* from a bank account with sufficient funds without deposit of the interstate checks?

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UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Joseph R. Lennon respectfully requests that a writ of certiorari issue to review an opinion and judgment of the United States Court of Appeals for the Fifth Circuit, which affirmed Petitioner's conviction of eight (8) counts of an indictment alleging the interstate transportation of checks knowing that certain proceeds of such checks were obtained by fraud in violation of 18 U.S.C. section 2314 and 18 U.S.C. section 2(b).

THE OPINION BELOW

This is the second appeal of this case. The first opinion of the Court of Appeals for the Fifth Circuit is reported at 751 F.2d 737 (5th Cir. 1985). This Court denied Petitioner's first petition for certiorari at 471 U.S. ____, 105 S. Ct. 2324, 85 L.Ed.2d 842 (1985). Petitioner now requests that a Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit issue for its opinion which is reproduced as an appendix to this petition beginning at page 1a. This opinion is reported in 814 F.2d 185 (5th Cir. 1987).

JURISDICTION

The Opinion of the Court of Appeals was entered on March 31, 1987. Petitioner timely filed a Petition for Rehearing which was denied on June 29, 1987. On September 2, 1987, this Court extended the time for filing a Petition for Writ of Certiorari to and including September 25, 1987, a copy of that Order is attached to this petition as Appendix B.

Petitioner envokes the court's certiorari jurisdiction pursuant to 28 U.S.C. section 1254(1). The filing of this Petition for Writ of Certiorari is timely pursuant to the Order of this Court.

STATUTORY PROVISIONS INVOLVED

Title 18, United States Code, section 2314, provides as follows:

> "Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money of the value of $5,000.00 or more, knowing

> the same to have been stolen, converted or taken by fraud . . .
>
> "Shall be fined not more than $10,000.00 or imprisoned not more than ten years, or both."

Title 18, United States Code, section 2, provides as follows:

> "(b) whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

STATEMENT OF THE CASE

On January 27, 1983, a Federal Grand Jury in the Southern District of Texas returned an indictment against Petitioner, Joseph R. Lennon, alleging eight (8) counts of willfully causing the interstate transportation of checks knowing that certain proceeds of those checks had been taken by fraud, in violaton of 18 U.S.C. section 2314 (paragraph 1) and 18 U.S.C. section 2(b).[1]

Lennon pled not guilty and was convicted by a jury on all eight counts. Lennon appealed this conviction to the United States Court of Appeals for the Fifth Circuit.

On October 31, 1984, the Fifth Circuit reversed Lennon's conviction. Both Lennon and the United States filed timely Petitions for Rehearing to that opinion. On January 11, 1985, the Fifth Circuit withdrew its earlier opinion and again reversed and remanded Lennon's conviction because of an erroneous jury instruction.

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1. Although there have been exhaustive objections to that indictment, both at trial and on appeal, it is thought best at his juncture to let the indictment speak for itself. Accordingly, the indictment is reproduced as Appendix C.

Lennon filed a Petition for a Writ of Certiorari to this court, which was denied.

Lennon was then retried and convicted by a jury in the Southern District of Texas, Houston Division, the Honorable Judge Carl O. Bue, Jr., presiding.[2]

Lennon again timely appealed his conviction and sentence. On March 31, 1987 the Fifth Circuit affirmed Lennon's conviction. The Fifth Circuit ruled that although kickback checks to Lennon did not travel interstate, the checks from which those kickbacks were paid did travel interstate. Thus, reasoned the Court what traveled interstate was "the same" as what was "taken by fraud." Lennon's Petition for Rehearing was denied on June 29, 1987. Lennon timely filed a Motion to Stay Issuance of the Mandate, which the Fifth Circuit denied. On September 11, 1987, Lennon was placed in federal confinement.

On August 28, 1987, Lennon timely filed an Application to extend the time for filing this Petition for a Writ of Certiorari. On September 2, 1987, this Court entered an Order extending the time for filing a Petition for a Writ of Certiorari to, and including, September 25, 1987.

Lennon was in charge of crude oil acquistion for Charter International Oil Company (Charter) in Houston (R. 13:20, 92). During 1974 Lennon agreed to purchase crude oil for Chater from Southwest Petrochem (Petrochem), a Houston oil trading company owned by Milton Jones. Jones agreed to pay Lennon a "commission" for that purchase. Lennon instructed Jones to pay the "com-

2. Judge Bue sentenced Lennon to four years imprisonment, a consecutive period of three years probation, and a cumulative fine of $70,000.00. This sentence was substantially the same that Lennon received after the first trial.

mission" to a company owned fifty percent by Lennon and fifty percent by his business partner, James Harrigan.

This "commission" arrangement between Jones and Lennon continued for almost four years before Charter issued the first check alleged in the indictment. In the meantime, the negotiations and sales between Charter and Petrochem were conducted by someone other than Lennon or Jones. The crude oil purchased from Petrochem by Charter was at or below the price paid to other suppliers. Lennon never told his supervisors at Charter about the commission payments.

The indictment involves eight crude oil purchases by Charter from Petrochem which occurred from February 1978 to March 1979.

Each of the eight purchases was negotiated at arms-length by someone other than Jones or Lennon, who had no knowledge of their "commission" agreement (R. 12:23; R. 13:92-93). After each Charter purchase, Petrochem hand delivered an invoice to Charter in Houston. Charter issued a check to Petrochem for payment which was drawn on an out-of-state bank. Each Charter check was hand delivered to Petrochem in Houston. Petrochem deposited each check in its Houston bank account (R. 11:60).

Because of the size of the Charter checks,[3] Petrochem's bank had a special courier deliver the checks to Charter's out-of-state banks for presentment and payment (R. 12:205-15). Charter's out-of-state banks then wire-transferred the funds to Petrochem's bank in Houston (R. 12:217-18).

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3. The smallest Charter check was for $1,845,070.47.

After each purchase by Charter, Jones would decide if, and how much, he could afford to pay Lennon as a "commission" based on how much profit Petrochem made on the sale (R. 12:23-24).[4] Jones than wrote a Petrochem check and had that "commission" check hand delivered to Lennon in Houston. The Petrochem check was deposited in a Houston bank by Lennon or Harrigan. The Petrochem account had sufficient funds to pay the Lennon "commissions" before the Charter funds were received (R. 11:60).[5]

During the first trial and appeal the Government urged the theory that the Charter checks themselves were taken by fraud and transported interstate. *United States v. Lennon*, 751 F.2d 737, 743 (5th Cir. 1985). Indeed, during the first trial, the trial court instructed the jury *inter alia* that if (the Charter) checks had a value in excess of $5,000.00 the requirements of section 2314 would be met. The Fifth Circuit rejected that position and found that to satisfy the proscription of section 2314 the proceeds taken by fraud must exceed $5,000.00. As a result of the erroneous jury instruction the case was reversed and remanded for another trial.

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4. Paradoxically, that profit had been determined by other agents of Charter and Petrochem, who negotiated without knowledge of the commission agreement. Lennon never attempted to influence Charter's agent in those negotiations, although it would have been in his economic interest to do so.

5. In point of fact, this statement is a conclusion by Petitioner of the testimony. The "commission" checks ranged from a minimum of $12,235.00 to a maximum of $27,373.00, while the bank account balance of Petrochem was between 2 and 4.5 million dollars. The Government has never disputed this fact, but rather has taken the position that according to their theory it is irrelevant. (Brief of United States pg. 31-32).

The case was then retried. During the second trial the Trial Court instructed the jury that the offense required that (the Charter) checks contain at least $5,000.00 in funds which were taken by fraud. *United States v. Lennon,* 814 F.2d 185, at 187, n.1 (5th Cir. 1987).

During the second appeal Lennon pointed out that what was transported in interstate commerce (the Charter checks) was not "the same" as what was "taken by fraud" (Lennon "commission" payments) as required by section 2314. Relying on *Dowling v. United States,* 473 U.S. 207, 105 S. Ct. 3127, 87 L.Ed. 152 (1985) which holds that section 2314 requires a physical identity of what is "taken by fraud", and that it be "the same" as that which is transported in interstate commerce, Lennon argued that "certain proceeds" is not the legal equivalent of the tangible Charter checks, since the Petrochem account had sufficient funds to pay the Lennon commissions without the Charter check deposits.

The Fifth Circuit rejected that argument on two grounds:

> First, *Dowling v. United States, supra* is limited to copyright infringements; and
>
> Second, *Dowling* explicitly refused to decide the degree of "sameness" required by section 2314 between what is transported in interstate commerce and what is "taken by fraud".

United States v. Lennon, supra at 188.

The Fifth Circuit then reasoned that the degree of "sameness" required by [section 2314] between the interstate Charter checks and the intrastate "commission" checks had been satisfied. Lennon's conviction was affirmed.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because the United States Court of Appeals for the Fifth Circuit has failed to follow controlling precedent in *Dowling v. United States,* 473 U.S. 207, 105 S. Ct. 3127, 87 L.Ed. 152 (1985) and has overextended the application of section 2314 which requires that the check transported in interstate commerce be "the same" as the check taken by fraud.

The Fifth Circuit further failed to follow its own precedent in *United States v. Poole,* 557 F.2d 531 (5th Cir. 1977). *Poole, supra* teaches that funds transported interstate are not "the same" as those "taken by fraud", when a check fraudulently taken is deposited into an intrastate bank account and that intrastate account has sufficient funds to cover checks drawn on the account and transported interstate.

To sustain a conviction pursuant to 18 U.S.C. section 2314:

> The evidence must show that what is transported in interstate commerce be "the same" as what is "taken by fraud." *Dowling v. United States, supra.*

What Was Transported In Interstate Commerce?

The eight Charter checks issued to Petrochem traveled in interstate commerce. Those eight checks are tangible objects as contemplated by section 2314. *Dowling v. United States, supra; United States v. Smith,* 686 F.2d 234 (5th Cir. 1982); *United States v. Seagraves,* 265 F.2d 876 (3d Cir. 1959); *United States v. Greenwald,* 497 F.2d 320 (6th Cir. 1973). If, however, the Charter

check (a tangible object) is what was taken by fraud, then the Government need only show that the Charter checks exceeded $5,000.00 to satisfy the $5,000.00 value requirement of section 2314. This position was rejected by the first panel of the Fifth Circuit in this case. *United States v. Lennon,* 751 F.2d 737 at 743 (5th Cir. 1985). Under this interpretation if, hypothetically, the checks from Charter to Petrochem had been $5,001.00 and the commission to Lennon $2.00, the jurisdictional value of section 2314 would be satisfied. The original panel decision recognized that such a result could not have been intended by Congress in passing section 2314. Accordingly, that panel found that what was taken by fraud must exceed $5,000.00 for the provisions of the first paragraph of section 2314 to be violated. It is therefore, apparent that the tangible Charter check was not what was "taken by fraud".

What Was "Taken By Fraud"?

Having correctly concluded that the tangible Charter check was not what was taken by fraud, this case was retried under the theory that "certain proceeds" of the Charter checks were taken by fraud. *United States v. Lennon, supra.*

It is abundantly clear that there is no physical identity between the Charter checks, which moved interstate and the proceeds which were taken by fraud.

The Changed Form Theory

This Court and many Courts of Appeal have interpreted "the same" as used in section 2314, paragraph 1, to include property stolen, converted, or taken by fraud,

but transformed into another media prior to interstate transfer. Since what was transported interstate is conceptually equivalent to what was taken by fraud, they are therefore "the same". *McElroy v. United States,* 455 U.S. 642, 102 S. Ct. 1332, 771 L.Ed.2d 522 (1982); *United States v. Levy,* 579 F.2d 1332 (5th Cir. 1978), *cert. denied,* 440 U.S. 920 (1979); *United States v. Pomponio,* 558 F.2d 1172 (4th Cir. 1977); *United States v. Walker,* 176 F.2d 564 (2nd Cir. 1949), *cert. denied,* 338 U.S. 891 (1949). Under the reasoning of these cases, if a thief stole $10,000.00 in $100.00 bills in Texas, changed those $100.00 bills into $20.00 bills also in Texas, and then transported the $20.00 bills interstate, those $20.00 bills transported interstate are conceptually "the same" as the stolen $100.00 bills. Thus, the proceeds of fraudulently obtained property are themselves to be considered fraudulently obtained. *United States v. Levy, supra* at 1336.

The Fifth Circuit panel opinion, to which this Petition for Writ of Certiorari is directed, concluded that *United States v. Levy, supra* controlled this case. Levy misappropriated a $160,320.00 check and deposited it into a Louisiana bank account containing $27,000.00 of his own money. Levy then drew two checks on that Louisiana account, for $45,000.00 and $55,000.00, and sent them interstate for deposit in his bank account in Texas. Applying the rationale of the "changed form" cases, the Court concluded that the $45,000.00 and $55,000.00 Levy checks were "the same" as the check originally stolen, because the stolen check was the source of the funds represented by the two checks. The panel in this case concluded that since the Charter checks were the source of the Jones to Lennon commission payments, they

were legally "the same" as the Charter checks which had been transported interstate. Thus, reasoned the Court:

> *Levy* teaches us that we may look behind the form of an interstate check in order to scrutinize the funds it represents . . .

The *Lennon* case is factually distinguishable from the *Levy* case in at least two regards:

First, Petrochem had adequate funds in its checking account to pay the Lennon commissions before the Charter checks were deposited. The funds used to pay Lennon his commissions, were what was "taken by fraud". Since the Petrochem account had adequate funds without the Charter checks to make the commission payments, those funds utilized to pay the Lennon commissions never traveled interstate.

What was "taken by fraud" is separate and distinct (and therefore, not "the same") from those Charter check proceeds which traveled interstate. The Fifth Circuit has so held in *United States v. Poole,* 557 F.2d 531 (5th Cir. 1977).

It is clear that the availability of independent funds in the Petrochem account for the payment of commissions to Lennon is of paramount significance. Even under a changed form theory, those cases which have addressed the issue have invariably required that there be an ability to trace those funds taken by fraud to those transported interstate. *United States v. Levy, supra; United States v. Pomponio, supra; United States v. Walker, supra.* The panel opinion of the Fifth Circuit in this case recognized that to hold otherwise would eliminate any degree of "sameness" other than that urged by the Government.

The Government urged the Court to equate "the same" to making a "matching set of funds, *from any source,* available . . ." (Brief of United States, pg. 34) (emphasis added). Congress could have written a statute broad enough to encompass such a transaction, but it has not done so in section 2314, paragraph 1.

Hypothetically, suppose that Jones received payment for crude oil in cash from Charter. Jones, with the cash in his brief case, then flies to Florida. While in Florida, Jones calls his office and directs an employee to pay Lennon a commission from Petrochem's Houston safe deposit box. Conceptually, this hypothetical case is no different from the case at bar or *United States v. Poole, supra.* What was "taken by fraud", and what was transported interstate are distinct. They are not "the same" and there is no violation of section 2314. This rationale is in accord with this Court's observation that there must be a physical identity of what was transported interstate and what was taken by fraud. *Dowling v. United States, supra.*

The second distinction between this case and the *Levy* case, et al. is that in *Levy* the tangible check taken by fraud was taken before the interstate transport of the two checks derived from the stolen check. A literal reading of section 2314, paragraph 1, requires that the taking precede the interstate transport. In *Loman v. United States,* 243 F.2d 327 (8th Cir. 1957), two confidence men, pretending to be law enforcement officials, induced the victim to travel from Missouri to his bank in Kansas. The victim withdrew $5,000.00 from his Kansas bank account, and returned with the $5,000.00 to Missouri and gave the money to the Defendants. Loman was

prosecuted under section 2314, paragraph 1. The Eighth Circuit reversed his conviction and concluded that at the time of its interstate transportation the money had not been "stolen":

> "To constitute the offense the property transported in interstate commerce must have been stolen property and it must have been of that character before it was transported in interstate commerce . . ."

243 F.2d at 329.

The *Loman* Court found no escape from the conclusion that the money had not been taken by fraud until after the interstate transportation had concluded. 343 F.2d at 331. *Loman* is factually indistinguishable from this case.[6]

Loman highlights the contorted concept of "taken by fraud" applied in the *Lennon* case. To conclude that the Charter checks were taken by fraud, we must construct a fiction that somehow Lennon has constructively received commission payments at the time the Charter checks were deposited into the Petrochem bank account in Houston. Then, and only then, has anything been taken by fraud before the interstate transport of the Charter checks. Under this fiction, the violation of 2314 by Lennon is complete when the Charter checks are transported interstate, regardless of whether Lennon in fact ever receives a commission payment.[7]

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6. Shortly after the *Loman* case Congress passed paragraph 2 of 2314, which criminalized the Loman conduct. Since the *Lennon* case does not involve inducing a victim to travel interstate, paragraph 2 has no application.

7. The Trial Court's instruction to the jury required that Lennon benefit in his own right. Presumably such a benefit could only have occurred when he received a tangible monetary benefit, specifically the payment of the commission by Jones.

In its opinion, the panel in this case concluded that:

> "The fraud occurred at the time the checks were sent from Charter to Petrochem because that is when Lennon inflated the amount of each Charter check in order to finance the ultimate kickback from Jones to Lennon's companies . . ."

United States v. Lennon, supra at 188.

Thus, the crime was complete in this case, according to the Fifth Circuit, when the Charter checks were transported interstate and the actual payment of commissions to Lennon, or the source of such payments, is irrelevant.

This case equates the receipt of an intangible benefit, namely the "expectancy of payment", to a taking by fraud as contemplated by section 2314. In this context, fraud under section 2314 includes Lennon's breach of his fiduciary duty to Charter, whether he obtained money or property or not, and is contrary to *McNally v. United States,* ____U.S.____, 55 L.W. 5011 (June 24, 1987).[8] Congress clearly never intended to extend "taking by fraud" in section 2314, paragraph 1 to that limit.

In this case, the Fifth Circuit has abrogated any requirement that what is "taken by fraud" be "the same" as what is transported in interstate commerce to violate

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8. It is clearly the Government's theory that this crime was complete before Lennon was paid any money. In fact, the Government argued that "while it is possible that by 1978 Jones paid Lennon with funds independent of the proceeds of the Charter checks, the *fact* that Jones paid Lennon at all is directly linked to the Charter checks. Through inflated checks, which moved in interstate commerce, Lennon arranged to put fraudulently obtained funds in the hands of his co-schemer, Milton Jones, so that Jones would make matching funds, from any source, available to Lennon. The crime was complete at the time the inflated checks entered their interstate movement. . . .". (Brief of United States pg. 34).

section 2314, paragraph 1. Such a holding is contrary to the mandate of this Court in *Dowling v. United States,* 473 U.S. 207, 105 S. Ct. 3127, 87 L.Ed. 152 (1985). The Opinion below further elevates the concept of "taken by fraud" to include an expectancy of payment, which is an intangible, and is contrary to this Court's requirement that the concept of fraud should be limited to tangible or property rights. *United States v. McNally, supra.* The Fifth Circuit has further refused to follow its own controlling precedent in *United States v. Poole, supra,* which requires that to violate section 2314, paragraph 1, property taken by fraud must, at the very least, be traceable to what is transported interstate.[9]

The Fifth Circuit has failed to follow decisions by this Court and its own precedent, thereby extending the National Stolen Property Act far beyond the application intended by Congress. It is requested that the decision below be reviewed by this Court.

CONCLUSION

For all of the foregoing reasons, Petitioner, Joseph R. Lennon, respectfully suggests that his Petition for the Writ of Certiorari should be granted.

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9. Even Bankruptcy creditors who wish to claim a priority for converted security are required to trace the transmuted assets. At the very least, the Government should be required to do as much in a criminal prosecution under section 2314, paragraph 1.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Writ of Certiorari has been served upon the Solicitor General, Department of Justice, Washington, D.C. 20530, in accordance with Supreme Court Rule 28, Title 28, U.S.C.A., the same having been mailed, first class mail, on the _____ day of September, 1987.

OLNEY G. WALLIS

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-2175

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JOSEPH R. LENNON,
Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas

(March 31, 1987)

Before WILLIAMS, JOLLY and DAVIS, Circuit Judges.
DAVIS, Circuit Judge:

Joseph R. Lennon appeals his conviction for having violated the National Stolen Property Act. 18 U.S.C. § 2314. We affirm.

I.

The facts of this case were fully developed in Lennon's first appeal, *United States v. Lennon*, 751 F.2d 737 (5th Cir. 1985), but we will briefly summarize them here.

Joseph R. Lennon was the manager of crude oil supply for Charter International Oil Company (Charter). Lennon controlled Charter's purchases of crude Oil, and directed the company to make periodic purchases from Southwest Petrochem, Inc. (Petrochem), owned by Milton Jones. In return for arranging these purchases, Lennon extracted a kickback from Jones varying in price from $.10 to $.20 per barrel purchased. Lennon instructed Jones to pay the kickback to either H & L Enterprises or Harlen Trading Company, companies owned fifty percent by Lennon and fifty percent by his business partner, James Harrigan. In one instance, Jones paid a kickback to Lennon's sole proprietorship named LATCO. The evidence indicated that the kickbacks totaled $1,193,000.

Lennon was charged in an eight-count indictment with causing the interstate transportation of certain checks knowing that certain proceeds of each check were obtained by fraud in violation of the National Stolen Property Act. 18 U.S.C. §§ 2314, 2(b). The proof at trial showed that the checks from Charter to Petrochem traveled in interstate commerce while the kickbacks from Jones to Lennon's companies did not. The government's theory focused on the Charter checks themselves, and sought to prove that the amount of each check was inflated by the amount of the kickback Jones would ultimately pay to Lennon's companies.

In 1983, a jury convicted Lennon on all counts in a trial before the Honorable Carl O. Bue, Jr. The court fined Lennon $70,000 and sentenced him to serve four years in prison. We reversed Lennon's conviction because of an erroneous jury instruction, *Lennon,* 579 F.2d at 743-44, and the case was retried. The district court

amended its jury instructions to conform to our previous panel opinion. The jury convicted Lennon and he was given the same sentence. This appeal followed.

II.

The crux of Lennon's defense is that his activities do not fall within the narrow strictures of the National Stolen Property Act. The Act imposes criminal penalties on anyone who:

> transports in interstate . . . commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud.

18 U.S.C. § 2314 (emphasis added). Lennon argues for a strict interpretation of the statute's requirement that what is transported in interstate commerce be "the same" as what is "taken by fraud."

In the instant case, the items transported in interstate commerce were securities, in the form of checks, that were drawn by Charter and made payable to Petrochem. The amount of each Charter check was fraudulently inflated by Lennon in order to finance the ultimate kickback from Jones to Lennon's companies.[1] Each Charter

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1. We reject the contention that the evidence was insufficient for the jury to conclude that Lennon knew the Charter checks were inflated to contain at least $5,000 in fraudulently obtained funds before they traveled interstate. The government established that Jones agreed to pay Lennon a kickback before the Charter checks were issued and sent interstate. Jones and Lennon initially agreed to the kickback arrangement in 1974, approximately four years before the first Charter check named in the indictment traveled interstate. Based on the number of kickbacks Lennon received from Jones during that period of time, the jury was entitled to conclude that Lennon knew that the issuance of each Charter check would result in a kickback from Jones to Lennon's companies. Jones'

check therefore contained both legitimate funds designed to pay for crude oil and fraudulently obtained funds designed to finance kickbacks. Although each Charter check traveled in interstate commerce, only the kickback portion of each Charter check was "taken by fraud";[2] the

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testimony verifies that the Charter checks must have been inflated to accommodate the increased costs of providing a kickback to Lennon.

> Q. Now, Mr. Jones, during this time period, '77 to '79 that we've covered by these documents in front of you, I want to ask you this question: would you have been willing to sell crude oil to Charter on the following terms: During this time period in lieu of paying the commission to H & L or Harlen or Latco, to have reduced your sales price to Charter by the amount of that commission. Would you have been willing to sell on that basis?
>
> A. Yes, I would have. I would have sold crude oil to Charter almost at any price.

[R. Vol. II, p. 67.]

2. This theory of the case derives from our previous panel opinion. Lennon's original conviction was reversed by the previous panel because of an erroneous jury instruction on the elements of Section 2314. *United States v. Lennon*, 751 F.2d 737 (5th Cir. 1985). The district court instructed the jury that one element of the offense was "that such checks had a value in excess of $5,000." *Id.* at 743. The statute requires that the fraudulently obtained property transported in interstate commerce exceed $5,000 in value. 18 U.S.C. § 2314; *United States v. Lennon*, 751 F.2d at 744. The government argued that the instruction was correct because the checks themselves were taken by fraud and therefore the jurisdictional amount was properly satisfied in reference to the face value of each check. *Lennon*, 751 F.2d at 743. The panel rejected the government's argument and reversed, holding that it was impermissible that "the jury could have found that the checks from Charter to Petrochem exceeded $5,000 . . . and that some amount out of each larger check, possibly less than $5,000, was obtained by fraud." *Id.* at 744. The panel opinion held, *sub silento*, that only the kickback portion of each Charter check was taken by fraud. *Id.* at 743-44. On remand, the district court amended the jury instructions on the elements of the offense to require that "such checks *contained* at least $5,000 in funds, which were taken by fraud." (emphasis added). We believe this instruction cured the error identified by the prior panel opinion, and correctly focused the government's theory in the second trial on the value of the kickback portion of each check.

remainder was legitimately used to purchase crude oil. Lennon therefore argues that the Act does not apply because each Charter check that traveled in interstate commerce was not precisely "the same" as the kickback portion of the check that was "taken by fraud." We refuse to adopt such a narrow interpretation of the Act.

Lennon principally relies on *Dowling v. United States,* in which the Supreme Court reversed a conviction under Section 2314 for the interstate shipment of bootleg sound recordings and motion pictures whose unauthorized distribution infringed valid copyrights. 87 L.Ed.2d 152, 159 (1985). Dowling's section 2314 conviction rested on his unauthorized use of the copyrights, not on any allegation that he unlawfully possessed their physical embodiment in sound recordings and motion pictures. *Id.* at 159 n. 7. The Court reversed the conviction because "Congress had no intention to reach copyright infringement when it enacted § 2314." *Id.* at 166.

Lennon cites *Dowling* for a different proposition. To support his argument that the kickback portion of each Charter check was not "the same" as the checks themselves, Lennon cites the following passage from *Dowling*:

> The courts interpreting § 2314 have never required, of course, that the items stolen and transported remain in entirely unaltered form. Nor does it matter that the item owes a major portion of its value to an intangible component. But these cases and others prosecuted under § 2314 have always involved *physical* "goods, wares, [or] merchandise" that have themselves been "stolen, converted or taken by fraud." This basic element comports with the commonsense meaning of the statutory language: by requiring that the "goods, wares, [or] merchan-

> dise" be "the same" as those "stolen, converted or taken by fraud," the provision seems clearly to contemplate a *physical identity* between the items unlawfully obtained and those eventually transported, and hence some prior *physical* taking of the subject goods.

Id. at 159-60 (citations omitted) (emphasis added). Lennon argues that his conviction should be reversed because there is no "physical identity" between the checks that traveled in interstate commerce and the kickback portion that was "taken by fraud." We disagree for two reasons.

First, we interpret the Court's admonition that the statute contemplates "a physical identity between the items unlawfully obtained and those eventually transported" as distinguishing intangible rights, such as copyright, from the physical items the statute seeks to regulate, such as goods, wares, merchandise, securities or money.[3] The instant case presents no such question of coverage. On the contrary, the statute expressly reaches "securities," the definition of which indisputably includes the Charter checks at issue.

Second, the Court explicitly refused to address the issue before us: the degree of "sameness" the statute requires

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3. For example, on the same page as the above-quoted passage, the Court explains that "the property rights of a copyright holder have a character distinct from the *possessory* interest of the owner of simple "goods, wares, [or] merchandise. . . ." *Dowling*, 87 L.Ed.2d at 160 (emphasis added). Likewise, the Court questions whether the act of stealing a copyright "comfortably fits the terms associated with *physical* removal employed by § 2314. The infringer invades a statutorily defined province guaranteed to the copyright holder alone. But he does not assume *physical* control over the copyright. . . ." *Id.* (emphasis added).

between what is transported in interstate commerce and what is "taken by fraud." The Court expressly declined to consider the issue when the government in *Dowling* offered to show that "the wrongfully obtained tapes which contained the musical material should be considered 'the same' as the phonorecords onto which the sounds were transferred. . . ." *Id.* at 159 n.7. *Dowling* is therefore distinguishable and does not control the instant case.

In the instant case, the jury was entitled to find that the funds that were transported in interstate commerce were "the same" as those that were "taken by fraud." The government introduced extensive evidence that the Charter checks were the source of the kickbacks. The fraud occured at the time the checks were sent from Charter to Petrochem because that is when Lennon inflated the amount of each Charter check in order to finance the ultimate kickback from Jones to Lennon's companies. The district court properly instructed the jury that one element of the offense was that each Charter check "contained at least $5,000 in funds, which were taken by fraud." The jury was entitled to find that each Charter check not only contained legitimate funds designed to purchase crude oil, but also contained at least $5,000 in fraudulently obtained funds designed to finance kickbacks. The issue therefore reduces to whether the Act's requirement of "sameness" is satisfied even though both legitimate and illegitimate funds traveled interstate while commingled in the form of each check. We hold that it is.

We are persuaded that this case is controlled by *United States v. Levy*, 579 F.2d 1332, 1336 (5th Cir. 1978). The defendant in *Levy* engaged in a scheme where he took by fraud a check for $160,324 from the Alison Mortgage Company. *Id.* at 1333-34. The fraudulently

obtained check was deposited in a Lafayette, Louisiana bank account, controlled by the defendant. *Id.* at 1333. Lafayette bank account contained approximately $27,000 in legitimate funds that were not taken by fraud.[4] *Id.* at 1337. The defendant drew two checks on the account, one for $45,000 and one for $55,000. *Id.* at 1333. The two checks were then sent across state lines and were deposited in a bank in Beaumont, Texas. *Id.* The court upheld the section 2314 conviction, reasoning that the two checks that traveled interstate must have contained at least $5,000 in fraudulently obtained funds because there were not enough legitimate funds in the Lafayette bank account to cover either of the interstate checks. *Id.* at 1336-37. The court explained that there was "no doubt that the two checks sent to Beaumont *represented* the funds illegally acquired from Alison." *Id.* at 1337 (emphasis added).

Levy teaches that we may look behind the form of an interstate check in order to scrutinize the funds it represents. The conviction was upheld in *Levy* because each check that traveled interstate must have represented at least $5,000 of funds that were "taken by fraud." *Levy* also teaches that it is not an impediment to conviction that the interstate checks may have contained at least some legitimate funds commingled with the funds that were "taken by fraud." By upholding the section 2314 conviction, the court in *Levy* inevitably found that the interstate checks were "the same" as the funds that were

4. *Levy* does not explain whether these legitimate funds were present at the time the fraudulently obtained check was deposited. *Levy*, 579 F.2d at 1337. The opinion states only that the Lafayette bank account contained approximately $27,000 in legitimate funds "at the time the two checks sent to Beaumont were returned to the Lafayette bank for final payment." *Id.*

"taken by fraud." It was sufficient for a conviction under Section 2314 that the checks contained at least $5,000 in fraudulently obtained funds regardless of what portion, if any, represented legitimate funds.

By comparison, the instant case is much simpler. The government introduced evidence at trial that Lennon inflated the amount of each interestate Charter check in order to finance kickbacks. The jury was entitled to find that each check contained at least $5,000 in fraudulently obtained funds. As in *Levy,* it is no impediment to conviction that the fraudulently obtained funds were commingled in an interstate check with legitimate funds. It is sufficient that the Charter checks contained at least $5,000 in fraudulently obtained funds regardless of what portion represented legitimate funds. *See also United States v. Moore,* 571 F.2d 154, 157-58 (3rd Cir.), *cert. denied,* 435 U.S. 956 (1978) (counterfeit tickets held to be "the same" as stolen blank ticket stock).

Our holding is bolstered by the policy implications of a contrary result. Lennon seeks to reverse his conviction because the funds that were taken by fraud were commingled in a check with other legitimate funds. The logical extension of Lennon's argument is that a defendant charged with violating section 2314 could escape conviction simply by proving that at least one dollar of the interstate check was sent in return for valid consideration. Congress could not have intended such a result.

III.

Lennon's only remaining argument worthy of discussion is based on an alleged defect in his indictment. Lennon's

attack focuses on paragraph No. 9 of count one which reads:

> On or about February 3, 1978, within the Southern District of Texas, the defendant, JOSEPH R. LENNON, for the purpose of executing the aforesaid *scheme and artifice to defraud* and for obtaining money and property in excess of $5,000 by means of false and fraudulent pretenses did transport and cause to be transported in interstate commerce Charter check number 22691 in the amount of $2,419,-620.00 made payable to Southwest Petrochem in that he caused it to be transported from Houston, Texas, to Jacksonville, Florida, knowing that certain proceeds of the check to have been taken by fraud.

Lennon argues that the indictment is defective because it includes the phrase "scheme and artifice to defraud" which derives from the second paragraph of 18 U.S.C. § 2314. Lennon was convicted of violating the first paragraph of 18 U.S.C. § 2314 which penalizes anyone who transports in interstate commerce any securities of the value of $5,000 or more knowing the same to have been taken by fraud. 18 U.S.C. § 2314. Lennon argues that the indictment must therefore fall because it impermissibly creates a "hybrid" offense of paragraphs one and two while the conviction was based only on paragraph one of section 2314.

While we agree that the indictment was inartfully drawn, the inclusion of the phrase "scheme or artifice to defraud" does not make the indictment defective. Lennon's conviction is properly based on his having "taken by fraud" the kickback portion of each Charter check. The inclusion of the phrase "scheme or artifice to de-

fraud" was mere surplusage and was meant only to elaborate the nature of Lennon's fraudulent activity. *United States v. Hughes,* 766 F.2d 875, 879 (5th Cir. 1985). We therefore uphold the district court's determination that the indictment was not defective.

The judgment of the district court is therefore AFFIRMED.

APPENDIX B

SUPREME COURT OF THE UNITED STATES

No. A-189

JOSEPH R. LENNON,
Applicant,

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for the applicant,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 25, 1987.

/s/ BYRON R. WHITE
Associate Justice of the Supreme
Court of the United States

Dated this 2nd day of September, 1987.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CRIMINAL NO. H-83-7

UNITED STATES OF AMERICA

v.

JOSEPH R. LENNON

INDICTMENT

THE GRAND JURY CHARGES:

COUNT ONE

A. INTRODUCTION

1. Charter International Oil Company, Inc., and Charter Crude Oil Company, Inc., subsidiaries of Charter Oil Company, Inc. (hereinafter referred to interchangeably as "Charter") were corporations organized under the laws of Texas and Florida respectively, with their principal places of business in Houston, Texas, and Jacksonville, Florida, and were engaged in the purchase, sale, and refining of crude oil in the United States.

2. Southwest Petrochem, Inc., was a corporation organized under the laws of Texas with its principal place of business in Houston, Texas, and was engaged in the purchase and sale of crude oil in the United States.

3. H&L Enterprises, a partnership operating under the laws of Texas, was owned fifty percent (50%) each by defendant, JOSEPH R. LENNON and James E. Harrigan.

4. Harlen Trading, Inc., was a corporation organized under the laws of Texas, with its principal place of business in Houston, Texas, and was owned and operated by defendant JOSEPH R. LENNON and James E. Harrigan.

5. LATCO was a sole proprietorship owned and operated in Houston, Texas, by defendant, JOSEPH R. LENNON.

6. Defendant, JOSEPH R. LENNON, was an employee and officer of Charter responsible for crude oil purchases for Charter.

B. THE SCHEME AND ARTIFICE TO DEFRAUD

7. From on or about August 1974, up to and including on or about March, 1979, the exact dates being unknown to the Grand Jury, within the Southern District of Texas and elsewhere, defendant JOSEPH R. LENNON, together with others known and unknown to the Grand Jury, devised and intended to devise and employ a scheme and artifice (1) to defraud Charter of its right to the honest, conscientious, faithful, loyal, disinterested and unbiased services, actions and performance of duties by its employee, JOSEPH R. LENNON, free from bribery, corruption, partiality, willful omission, bias, dishonesty, deceit, misconduct, and fraud and (2) to obtain money from Charter by means of false pretenses and fraud.

C. THE MANNER AND MEANS OF THE SCHEME AND ARTIFICE TO DEFRAUD

8. Among the manner and means employed by the defendant, JOSEPH R. LENNON, to further the scheme and artifice to defraud and to obtain money and property from Charter by means of false and fraudulent pretenses were the following:

a. As an employee and officer of Charter, defendant, JOSEPH R. LENNON negotiated with Southwest Petrochem in connection with Southwest Petrochem's sale of crude oil to Charter and, as a condition of the sale, arranged to receive from Southwest Petrochem a bribe and kickback which varied from ten cents to twenty cents per barrel of crude oil sold by Southwest Petrochem to Charter.

b. Defendant, JOSEPH R. LENNON, directed Southwest to pay the bribes and kickbacks to either H&L Enterprises, Harlen Trading, Inc., or LATCO.

c. By arranging to receive the bribes and kickbacks in the form of payments to H&L Enterprises, Harlen Trading Inc., or LATCO, the defendant, JOSEPH R. LENNON, enriched himself and James E. Harrigan during the relevant time period in the amount of approximately $1,193,000.00.

9. On or about February 3, 1978, within the Southern District of Texas, the defendant, JOSEPH R. LENNON, for the purpose of executing the aforesaid scheme and artifice to defraud and for obtaining money and property in excess of $5,000 by means of false and fraudulent pretenses did transport and cause to be transported in

interstate commerce Charter check number 22691 in the amount of $2,419,620.00 made payable to Southwest Petrochem in that he caused it to be transported from Houston, Texas, to Jacksonville, Florida, knowing that certain proceeds of the check to have been taken by fraud.

(Violation of Title 18, United States Code, Sections 2314 and 2.)

COUNTS TWO THROUGH EIGHT

1. Paragraphs 1 through 8 of Count One are hereby realleged and incorporated as though set forth in full herein;

2. On or about the dates set forth below in the Southern District of Texas, the defendant, JOSEPH R. LENNON, for the purpose of executing the aforesaid scheme and artifice to defraud and for obtaining money and property in excess of $5,000 by means of false and fraudulent pretenses did transport and cause to be transported in interstate commerce from Houston, Texas, as set forth below, the following Charter checks made payable to Southwest Petrochem, knowing that certain proceeds of the checks to have been taken by fraud.

Count	*Date*	*Amount*	*Check No.*	*To*
2	3-6-78	$3,078,392.68	#17470	Jacksonville, Florida
3	4-7-78	$2,986,875.00	#17560	Jacksonville, Florida
4	9-6-78	$2,854,260.00	#10988	Chicago, Illinois
5	11-6-78	$2,469,421.20	#0000252	Holyoke, Massachusetts
6	12-6-78	$3,769,652.70	#0000330	Holyoke, Massachusetts
7	1-5-79	$3,732,987.76	#0000436	Holyoke, Massachusetts
8	3-7-79	$1,845,070.47	#0000865	Holyoke, Massachusetts

(Violation of Title 18, United States Code, Sections 2314 and 2.)

A TRUE BILL:

/s/ FRANK D. PICKENS
Foreman of the Grand Jury

DANIEL K. HEDGES
United States Attorney

By: /s/ STEPHEN P. LEARNED
Stephen P. Learned
United States Department of Justice

By: /s/ W. W. TORREY
W. W. Torrey
Assistant United States Attorney